80-123 No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for Writ of Certiorari to the Supreme Court of New Jersey

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Questions Presented

1. Is the New Jersey Emergency Transportation Tax Act properly designed to impose a fair share of the costs incurred by New Jersey in the operation of interstate transportation facilities upon nonresidents who directly benefit from those facilities and thus consistent with the requirements of Article IV of the Privileges and Immunities Clause of the United States Constitution?

2. Can two states enter into an agreement to coordinate their laws relating to the taxation of individuals who work in one of the states and reside in the other without securing congressional approval pursuant to the Compact Clause of the United States Constitution (Art. I, §10, cl. 3)?

3. Is the objective of the Privileges and Immunities Clause of Article IV of the United States Constitution of maintaining harmonious interstate relations satisfied by the 1962 agreement between the States of New York and New Jersey which establishes a system for the coordination of the tax laws of the two states by which tax revenues from individuals who reside in one state and earn their income in the other are equitably apportioned while the imposition of double taxation is avoided?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINION BELOW	2
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
Point I—If the Court notes probable jurisdiction to consider the claim of the appellants-cross respondents that the Emergency Transportation Tax Act violates the Privileges and Immunities Clause of Article IV of the United States Constitution it should grant the cross petition in order to be able to review the entire case	5
Point II—The decision of the Supreme Court of New Jersey, that the 1962 Agreement between New York and New Jersey is unenforceable against the cross respondents because it did not receive congressional approval pursuant to Article I, §10, Cl. 3 of the United States Constitution, is irreconcilable with the Court's decision in United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978)	7

PAGE

Point III—The Emergency Transportation Tax is consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV is designed to serve, because it is imposed and collected pursuant to a 1962 Agreement between the states of New York and New Jersey which provides for the co-ordination of the tax laws of the two states by equitably apportioning tax revenues from individuals who reside in one state and earn their income in the other while avoiding the imposition of double taxation 9

CONCLUSION 15

Cases Cited

Austin v. New Hampshire, 420 U.S. 656 (1975) 10

Bode v. Barrett, 344 U.S. 583 (1953) 9

Hicklin v. Orbeck, 437 U.S. 518 (1978) 10

Lawrence v. State Tax Commission, 286 U.S. 276 (1932) 11

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 5

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 10, 11

Raley v. Ohio, 360 U.S. 423 (1959) 4

Toomer v. Witsell, 334 U.S. 385 (1948) 14

United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978) 7-9

PAGE

United States Constitution Cited

Article I, Section 10, Clause 3 ..... i, 3, 7

Article IV, Section 2, Clause 1 ..... i, 3, 5, 9-11, 14

Statutes Cited

L. 1962, Ch. 2 12

Ch. 70 ..... 12, 13

N.J.S.A. 54:8A-1 to 57 (New Jersey Emergency Transportation Tax Act) ..... i, 3, 5, 12

28 U.S.C.:

Sec. 1257 ..... 2, 5

Sec. 1257(3) 2

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On Cross Petition for Writ of Certiorari to the Supreme Court of New Jersey

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CROSS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The cross petitioner, Sidney Glaser, respectfully prays that a writ of certiorari issue to review the opinion and order of the Supreme Court of New Jersey entered on March 26, 1980.

Opinion Below

The opinion of the Supreme Court of New Jersey has been officially reported in 82 N.J. 482 and also is reproduced in Appendix A to the appellants' jurisdictional statement on the appeal of this matter (*Salorio* v. *Glaser*, United States Supreme Court Docket No. 79-2026). The opinion of the Superior Court of New Jersey, Chancery Division, which is not officially reported, has been reproduced in Appendix B to the appellants' jurisdictional statement.

Jurisdiction

The opinion and order of the Supreme Court of New Jersey which is the subject of this cross petition was issued on March 26, 1980. On June 24, 1980, the cross petitioner applied for an extension of time within which to file this cross petition. This application was granted on June 25, 1980 by order of Mr. Justice Brennan extending the time to file this cross petition until July 24, 1980.

Although the cross petition invokes the jurisdiction of the Court pursuant to 28 U.S.C. §1257(3), it is the position of the cross petitioner, for the reasons set forth in Point I of his motion to dismiss the appeal filed by appellants-cross respondents, that the opinion and order of the Supreme Court of New Jersey is not a final judgment for the purposes of conferring jurisdiction upon the Court pursuant to 28 U.S.C. §1257. However, if the Court concludes that those parts of the case decided by the Supreme Court of New Jersey are sufficiently separate and distinct from that part remanded so as to be characterized as final, it is submitted that that conclusion necessarily would extend to the questions which the cross

petitioner seeks to have reviewed. In fact, although the Privileges and Immunities claim on which the appellants-cross respondents seek to appeal is the same issue as is the subject of the remand, the claims of the cross petitioner that the 1962 agreement between New York and New Jersey is enforceable against the appellants-cross respondents even though it did not receive congressional approval and that this agreement requires the Emergency Transportation Tax Act (hereinafter referred to as the "ETT") to be sustained are not involved in the remand. Therefore, the arguments that the Supreme Court of New Jersey's rejection of these claims is a final judgment are, if anything, stronger than the finality arguments presented by the appellants-cross respondents in their Jurisdictional Statement.

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax Act, N.J.S.A. 54:8A-1 to 57.

Reported in Appendix C to Jurisdictional Statement.

United States Constitution, Art. IV, §2, cl. 1.

> "The Citizens of each State shall be entitled to all Priviliges and Immunities of Citizens in the several States."

United States Constitution, Art. I, §10, cl. 3.

> "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ."

Statement of the Case

The general procedural history of the case and the facts material to the issues presented by this cross petition are set forth in the Statement of the Case in the motion to dismiss.

The claim that the ETT is properly designed to impose upon nonresidents a fair share of the costs of interstate transportation facilities was raised in paragraph 4 of cross petitioner's answer and in his brief in opposition to cross respondents' summary judgment motion dated October 28, 1977 at page 21, *et seq.* The contention was accepted by the trial court (see App. B at 51-55) but, as more fully discussed in the motion to dismiss, the Supreme Court of New Jersey has concluded that a plenary trial must be conducted to properly evaluate this claim (App. A at 17-27).

The claim that the agreement between New York and New Jersey is invalid because not entered into in conformity with the Compact Clause of the United States Constitution (Art. I, §10, cl. 3) was raised by cross respondents by letter dated March 10, 1978 to the trial court. This argument was explicitly rejected by the trial court (App. B at 56). Although cross respondents seemingly abandoned this claim in their appellate brief, the Supreme Court of New Jersey nonetheless held that the 1962 agreement could not be relied upon in defending the ETT because it was not entered into in conformity with the Compact Clause (App. A at 27-31). The issue was therefore expressly passed upon by the State's highest court and may be reviewed by the Court. *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959).

The claim that the 1962 agreement between the states satisfies the obligations of the Privileges and Immunities Clause was explicitly raised by the cross petitioner in its

reply memorandum to the trial court dated February 17, 1978 at page 22, *et seq.* This argument was accepted by the trial court (App. B at 56-57). However, the Supreme Court of New Jersey did not reach this issue because it ruled, as noted in the preceding paragraph, that the agreement was invalid because not entered into in conformity with the Compact Clause. Under these circumstances the Court normally will decline to consider an issue as a matter of policy and instead remand the case for initial consideration of the issue by the lower court, but this restriction is not jurisdictional in nature and thus the Court may reach the issue if it is deemed appropriate. See *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 163-164 (1975).

REASONS FOR GRANTING THE WRIT

POINT I

If the Court notes probable jurisdiction to consider the claim of the appellants-cross respondents that the Emergency Transporation Tax Act violates the Privileges and Immunities Clause of Article IV of the United States Constitution, it should grant the cross petition in order to be able to review the entire case.

As indicated in the motion to dismiss, it is the position of the cross petitioner that the remand order from which the appeal and cross petition have been taken is not a final judgment subject to appeal pursuant to 28 U.S.C. §1257. Furthermore, even if the remand order could be characterized as final, the cross petitioner also urges that the decision of the Supreme Court of New Jersey, that the existing record is inadequate, does not

present a substantial constitutional question warranting review by the Court. However, in the event the Court finds the remand order to be a final judgment and concludes that the case presents a substantial constitutional question in its present procedural posture, it is imperative that the Court consider the entire case rather than solely the portion of the case which would be placed before it by the appeal.

Since the Supreme Court of New Jersey remanded the case for further proceedings, the sole effect of an affirmance of the order sought to be appealed would be to permit the proceedings on remand to go forward. For the Court to review the trial court's determination that the constitutionality of the ETT can be upheld based upon the existing record the Court also would have to grant the cross petition.

It also should be noted that the record and case authority upon which the cross petitioner would rely in urging that the validity of the ETT can be upheld on the existing record is the same as that which will be relied upon by the appellants-cross respondents. Therefore, it would require no greater expenditure of resources of the Court or the parties if the Court also grants the cross petition in the event probable jurisdiction is noted.

Furthermore, the existing record provides a sufficient foundation upon which the constitutionality of the ETT can be sustained. The record developed before the trial court contains competent proof that nonresidents receive a direct benefit from the tax and that the tax burden upon those nonresidents is not unreasonable. The record shows that nonresidents who work in New Jersey impose a substantial burden on the State's transportation system, that New Jersey incurs substantial costs in the construction and maintenance of that system and that without the ETT

nonresidents would not pay their fair share of those costs. The record also shows that there is no inequity in the taxes generally paid by nonresidents under the ETT compared with the overall taxes paid by New Jersey residents. In short, it is the position of the State that there is ample credible evidence in the record to support the trial court's conclusion that the taxes imposed upon nonresidents by the ETT are fairly related to the benefits they derive from New Jersey. Consequently, if probable jurisdiction is noted the Court should also have before it the arguments which support the appellee's-cross petitioner's position that the ETT is consistent with the requirements of the Privileges and Immunities Clause of Article IV.

POINT II

The decision of the Supreme Court of New Jersey, that the 1962 Agreement between New York and New Jersey is unenforceable against the cross respondents because it did not receive congressional approval pursuant to Article I, §10, Cl. 3 of the United States Constitution, is irreconcilable with the Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U. S. 452 (1978).

In *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978), the Court squarely held that reciprocal legislation between two or more states providing for the apportionment or allocation of taxes payable by taxpayers with multi-state contacts may be validly enacted without the consent of Congress pursuant to the Compact Clause of the United States Constitution (Art. I, §10, cl. 3). The compact which was upheld was remarkably similar in subject matter and purposes to the

accord at issue here. Both agreements seek interstate coordination of tax policy toward taxpayers with ties to more than one state, in the interests of equity and convenience. Specifically, the four stated purposes of the Multistate Tax Compact are equally applicable to the 1962 Accord: equitable apportionment uniformity, convenience, and the avoiding of duplicative tax liability. *Id.* at 456.

The Court in *United States Steel Corp.* v. *Multistate Tax Commission* reiterated the established doctrine that the strictures of the Compact Clause apply only to those interstate agreements that transfer state sovereignty *"in a way that encroaches upon the supremacy of the United States."* *Id.* at 472 (emphasis added). The Court found that an agreement by which the states seek to coordinate the operation of their tax laws with respect to taxpayers with multistate contacts does not in any way encroach upon the sovereignty of the United States and therefore does not require congressional approval. In light of the close similarities in purpose and effect between the Compact upheld in *United States Steel Corp.* v. *Multistate Tax Commission, supra,* and the 1962 Accord between New York and New Jersey, the Supreme Court of New Jersey should have recognized that the 1962 Accord could be fully effective without congressional approval.

However, in holding that because ". . . no [congressional] approval was given, the Accord cannot be relied on by the State here as an enforceable agreement", the court confused the question whether New York is free to withdraw from the 1962 agreement (which it has never done) with the question whether the agreement is binding upon taxpayers such as the cross respondents so long as it remains in effect. The power of New York to withdraw from the 1962 Accord is not in issue in this case. Rather, the question is whether the agreement is bind-

ing upon taxpayers so long as it remains in effect. And on this latter question, the Court in *United States Steel Corp.* v. *Multistate Tax Commission* squarely held that two or more states may enter into an agreement relating to the apportionment of tax revenues which would be binding upon taxpayers without securing congressional approval. See also, *Bode* v. *Barrett,* 344 U.S. 583, 586 (1953) (Illinois highway use tax exemption for nonresidents does not require congressional approval where the states of the nonresidents reciprocally grant similar tax exemptions to citizens of Illinois). Therefore, the Supreme Court of New Jersey was simply wrong in concluding that the 1962 Accord is unenforceable against the cross respondents because not enacted in conformity with the Compact Clause.

POINT III

The Emergency Transportation Tax is consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV is designed to serve, because it is imposed and collected pursuant to a 1962 Agreement between the states of New York and New Jersey which provides for the coordination of the tax laws of the two states by equitably apportioning tax revenues from individuals who reside in one state and earn their income in the other while avoiding the imposition of double taxation.

A reciprocal arrangement between two states to fairly allocate the financial burdens of government between citizens who reside in one state and work in the other, without imposing any additional overall tax burden on an individual simply because he chooses to work outside the

state where he resides, is fully consistent with the objectives sought to be achieved by the Privileges and Immunities Clause of Article IV. This provision, ". . . which 'appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . the provisions for the admission of new States, the Territory and Property Clause, and the Guarantee Clause,' *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 379 (1978), 'establishes a norm of comity.' *Austin* v. *New Hampshire,* 420 U.S. 656, 660 (1975), that is to prevail among the States with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck,* 437 U.S. 518, 523-524 (1978). The opinion of the Court in *Austin* v. *New Hampshire, supra,* reaffirmed the view that the primary purpose of this Clause was the maintenance of proper relations between sovereign states in a federal union:

> "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." 420 U.S. at 662.

Therefore, while invalidating New Hampshire's unilteral action in imposing a tax on Maine residents—described in *Pennsylvania* v. *New Jersey,* 426 U.S. 660, 662 (1976), as a "beggar-thy-neighbor tax"—the Court was careful to point out that the Privileges and Immunities Clause would not require the invalidation of tax on nonresidents which was part of a reciprocal arrangement between the state of domicile and the state of employment:

> "Neither *Travis* nor the present case should be taken in any way to denigrate the value of re-

> ciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws." 420 U.S. at 667, n. 12.*

Therefore, it is clear that the Privileges and Immunities Clause of Article IV does not preclude sovereign states in the federal system, each acting in the interests of its own citizens, from entering into agreements which establish a fair system for the imposition of taxes upon citizens with multi-state contacts.

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* The cross respondents have argued previously that this quotation does not support the validity of the ETT because the ETT does not accord them "favorable treatment". This argument is fallacious for several reasons. First, it is strongly arguable that the agreement does assure individuals in cross respondents' situation more favorable tax treatment than they otherwise might receive. Since the State of New York may constitutionally suject cross respondents to tax on the full amount of their income wherever earned (*Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280-281 (1932)) and it is not disputed that cross respondents may be taxed pursuant to the New Jersey Gross Income Tax Act to the full extent of their New Jersey income, cross respondents have an exposure to double taxation on their New Jersey income which the agreement between the states serves to avoid. Furthermore, if the avoidance of possible double taxation is not recognized as "favorable treatment", it is still clear that the ETT does not impose any disadvantage upon cross respondents but rather, at worst, simply has a neutral effect upon them, since the amount of taxes which they pay to New Jersey under the ETT is identical to what they otherwise would be required to pay New York. A reciprocal arrangement which has a neutral effect on the overall tax obligations of a nonresident who works in another state is fully consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

The trial court found as a fact that the States of New York and New Jersey had entered into a reciprocal arrangement in 1962 regarding the taxation of individuals who reside in one of the states and work in the other. It found that "[t]here was in 1962 and there continued thereafter an arrangement between the States of New York and New Jersey, their governors and their legislators which accepted as valid the tax situation now being challenged" (App. B at 51); ". . . that the 1962 Accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states" (App. B at 56); and that "[n]either governor has taken formal action to rescind the limited part of the accord not dependent on legislative action, nor have they even made a statement which would challenge the validity of the arrangement" (App. B at 57).

There is more than sufficient evidence in the record to support the trial court's findings. When New Jersey first enacted the Emergency Transportation Tax Act in 1961, the incidents of the tax fell exclusively upon New Jersey residents. However, New York was apparently dissatisfied with the fiscal consequences of the reciprocal crediting provisions of the ETT and the New York Personal Income Tax, so appropriate steps were initiated to reverse the incidence of the taxes of the respective states. The New York Legislature enacted chapter 2 of the Laws of 1962 by which it repealed the tax credit previously afforded nonresidents for taxes paid to their state of residence and at the same time extended a credit to its own residents for taxes paid to the state in which they work. By chapter 70 of the Laws of 1962, the New Jersey Legislature enacted similar complementary amend-

ments to the ETT. The practical effect of these legislative enactments by the two states was to change the interstate taxing system of New York and New Jersey from one in which each state imposed a tax on its own residents to one in which each state imposed a tax on the residents of the other state who commuted to work in the taxing state.

This reciprocal legislative action by the legislatures of the two states set the essential framework for the May 6, 1962 agreement between Governors Rockefeller and Hughes. Indeed, paragraph 2 of the agreement is simply an announcement by Governor Rockefeller ". . . that New York, *under legislation enacted at the 1962 legislative session,* will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Tax Act enacted in 1961, as amended" (App. B at 44) (emphasis added). Similarly, paragraph 3 of the agreement announced the intent of Governor Hughes to submit to the New Jersey Legislature the bill which was enacted less than a month later as chapter 70. Complementary to those basic legislative provisions, the remaining paragraphs of the agreement set forth mutual agreements by the states not to participate in contesting the taxes imposed by the two laws and to assist and cooperate in the administration and enforcement of the two laws. Therefore, the 1962 Accord represented a solemn reciprocal undertaking between the legislative and executive branches of the respective states.

Furthermore, this agreement remains intact today. The New York Legislature has not sought to repeal the tax credit extended to its residents for taxes paid to New Jersey. And the New Jersey Legislature has adhered to New Jersey's essential obligation under the 1962 Accord

by continuing in effect the credit afforded its residents for taxes paid to New York. Similarly, neither governor has taken formal action to rescind the limited part of the accord not dependent on legislative action. Therefore, assuming *arguendo* that either state could unilaterally withdraw from the 1962 Accord, the plain fact is that neither state has attempted to do so.

The cross respondents seek to circumvent the provisions of the 1962 Accord by arguing that this case involves individual rights which are beyond the power of the states to address by reciprocal executive and legislative action. However, the Privileges and Immunities Clause is found in Article IV of the Constitution dealing with the relations among states. Therefore, "[t]he primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell,* 334 U.S. 385, 395 (1948). The legal import of the 1962 Accord is not that a state in concert with another state may limit the constitutional rights of an individual. Rather, the Accord represents a practical resolution by the legislatures and executives of New York and New Jersey of the problems of taxation of individuals who work in one of the states and reside in the other, without increasing the total tax burden of the cross respondents or any of the other commuters similarly situated. Therefore, if the Court notes probable jurisdiction it also should grant the cross petition in order to consider the effect of the 1962 Accord upon the ETT's conformity with the principles of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the cross petition for writ of certiorari should be granted.

Respectfully submitted,

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On Cross Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR CROSS RESPONDENTS JOHN SALORIO, ROBERT COE AND JOHN D. McGARR, JR. IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
REASONS WHY THE WRIT SHOULD BE DENIED	5
Point I—Cross Petitioner's Claim Based on an "Agreement" Between New York and New Jersey Is Not Worthy of Review	5
CONCLUSION	10

PAGE

TABLE OF AUTHORITIES

Cases Cited

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 3, 8, 9

New York v. *New Jersey*, 429 U.S. 810 (1976) 3, 6

Travis v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920) 9

United States Steel Corp. v. *Multistate Tax Commission*, 434 U.S. 452 (1978) 6, 7, 8

Statute Cited

54 N.J. Stat. Ann. §§ 8A-1-8A-57 (West) (Supp. 1979) (New Jersey Emergency Transportation Tax) ("Commuter Income Tax") 1

CROSS RESPONDENTS' BRIEF IN OPPOSITION

Counterstatement of the Case

This action was brought by cross respondents in June 1977 to declare unconstitutional the New Jersey Emergency Transportation Tax, also known as the Commuter Income Tax, 54 N.J. Stat. Ann. §§ 8A-1—8A-57 (West) (Supp. 1979), on the grounds that the tax is repugnant to the Privileges and Immunities and Equal Protection Clauses of the Constitution of the United States.

Both parties seek review of the New Jersey Supreme Court's judgment in this case, entered March 26, 1980. In our appeal, No. 79-2026, we set forth the underlying facts concerning the history of this litigation and the structure and operation of the Commuter Income Tax. We confine ourselves here to a brief rendering of the factual background of the claim New Jersey presses in this cross petition—that an "agreement" allegedly struck by the Governors of New York and New Jersey in 1962 to respect each other's taxing schemes, suffices to make an unconstitutional tax constitutional and estops cross respondents from challenging the tax. The background facts—or, more precisely, the absence of facts—make clear why the cross petition does not present issues worthy of this Court's review.

There was *no* document even purporting to be an agreement between the Governors of New York and New Jersey in the record of this case (or anywhere else, for that matter). The "agreement" relied on by cross petitioner is nothing but a press release issued by then Governors Rockefeller and Hughes—which cross petitioner dubbed an "executive accord." The press release is quoted in

full in the opinion of the New Jersey Superior Court (App. A, pp. 44a-45a).* We respectfully direct this Court's attention to that document, since it is obvious from the document's face that there is no agreement and that cross petitioner's claim is frivolous.

There was *no* reciprocal tax legislation by New York or New Jersey. The enactments of the New York and New Jersey legislatures now relied on by cross petitioner are nothing but separate tax legislation, undertaken spontaneously and without concert—which cross petitioner dubbed "reciprocal legislative action." The legislatures of New York and New Jersey, moreover, acted long before the date of the alleged "agreement". Cross petitioner's statement that the tax is imposed and collected pursuant to the purported agreement (Cross Petition, p. 9) is wrong and without any foundation in fact, since the tax was enacted on May 19, 1961—nearly a year before the May 6, 1962 date of the press release.

There was *no* claim concerning an "agreement" between the governors of the two states raised with any seriousness in the proceedings below. Such claim as cross petitioner made was nothing but an afterthought. Although cross petitioner submitted voluminous evidence regarding the tax during the extensive pretrial proceedings in this case, not once during that time did the cross petitioner allude to an agreement between the Governors of New York and New Jersey concerning the tax. Cross petitioner's contention that an agreement existed between the two states first appeared in New Jersey's brief to the trial court—and even then, New Jersey raised the press release solely to bolster its motion to dismiss the action

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* This notation refers to the Appendix filed with our appeal to this Court (No. 79-2026).

on the ground that New York State was the "real party-in-interest."* It was not until February 17, 1978, that New Jersey thought to argue—in a *reply* memorandum to the trial court—that a press release was sufficient to estop the plaintiff from challenging the constitutional defects of the New Jersey Commuter Income Tax.

There was *no* resolution by the court below of the threshold factual question on which the cross petition is predicated: whether any agreement of any kind between New York and New Jersey exists. The New Jersey trial court found that there was an "accord" between the two states and ruled that this accord, without more, was sufficient to take the tax entirely out of the ambit of *Austin* v. *New Hampshire*, 420 U.S. 656 (1975) (App. B, p. 56a). On appeal to the New Jersey Supreme Court, cross respondents challenged that finding of an "accord" as clearly erroneous. The New Jersey Supreme Court specifically noted that there was a question whether any "agreement" even existed: "The parties disagreed over the legal effect to be given the *alleged* 'accord' . . ." (App. A, p. 27a) (emphasis added). The New Jersey Supreme Court chose not to reach that factual question; it did not affirm the finding of the lower court, nor did it remand this question to the trial court. Instead, the court ruled that there was, in any event, no enforceable agreement between the two states because Congress did not approve any agreement (App. A, p. 30a), and because the New Jersey Commuter Income Tax must "independently pass muster under the Privileges and Immunities Clause." (App. A, p. 31a).

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* New Jersey argued that Governor Rockefeller's participation, as evidenced by the press release, made the State of New York the proper party in this action—even though New Jersey had previously argued—and this Court had held—that New York had no standing to sue. *See New York* v. *New Jersey*, 429 U.S. 810 (1976).

Summary of Argument

The Questions Presented by the cross petitioner presuppose that an agreement was entered into by the States of New York and New Jersey. But the record shows conclusively that there is no agreement. Thus, the "Questions Presented" by the cross petitioner are hypothetical questions.

The alleged agreement would not, in any event, be legally enforceable even if it did exist. The "agreement" does not comply with the requirements of the Compact Clause even though the agreement, as cross petitioner describes it, would grant one state the right to impinge on another state's power to regulate the tax liabilities of its own citizens. The agreement does not comply with the requirements of the Compact Clause even though the alleged purpose of the agreement would be to enforce a tax that is challenged as repugnant under the Privileges and Immunities Clause—a challenge that necessarily implicates essential federalism principles.

The agreement is wholly irrelevant to whether the New Jersey tax statute is repugnant under the Privileges and Immunities Clause. An agreement of whatever form between states is itself subject to the Privileges and Immunities Clause. Moreover, no agreement can affect taxpayers' individual right under the Privileges and Immunities Clause to be free from discriminatory taxation.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

Cross Petitioner's Claim Based on an "Agreement" Between New York and New Jersey Is Not Worthy of Review.

Cross petitioner's claim based on a purported agreement between New York and New Jersey raises no issue worthy of review by this Court for the following reasons:

1. The facts of record do not permit the formulation of the "Questions Presented" by the cross petitioner.

(a) The facts of record show conclusively that there was *no* agreement between New York and New Jersey. Although the press release mentions an "understanding" between the Governors of New York and New Jersey, it is obvious from the face of the press release that it is not itself an agreement. No actual agreement was ever entered into and no agreement was introduced into evidence.

The record does contain one actual agreement between the States of New York and New Jersey (Pa139-142). That agreement relates to tax withholding procedures—a matter irrelevant to any issue in this case. The document in which that agreement is embodied was signed by the respective tax officials of the two States; it contains a series of "whereas" clauses setting forth the reasons for an agreement; and it explicitly declares, "It is hereby agreed." That document demonstrates conclusively that when the States of New York and New Jersey wished

to create a contract concerning taxes, they knew how to do so.*

Cross petitioner took a press release and named it, in turn, an "executive accord," an "agreement," an "arrangement," and a "reciprocal understanding." No amount of rechristening, however, will alter basic principles of contract law. The paper remains a press release, not worth this Court's attention.

(b) In the absence of assurance from the record that an agreement even existed between New York and New Jersey, the "Questions Presented" in the cross petition pose nothing more than a hypothetical question. Indeed, since the record conclusively shows that there was no agreement, cross petitioner's Questions can be resolved only by rendering an impermissible advisory opinion. Accordingly, this Court should not grant certiorari.

2. The New Jersey Supreme Court's determination that, in any event, there was no legally enforceable agreement is consistent with this Court's recent decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978), and presents no issue worthy of review.

(a) An agreement by New York purporting to give New Jersey the right to "enforce" and thereby perpetuate the tax laws of New York State would be a delegation of New

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* Since cross petitioner obviously takes the position that any action, no matter how informal, can constitute a tax "accord" of great significance, no formal action should be necessary to rescind such an "accord". Therefore, as an *a fortiori* matter, on cross petitioner's theory any "accord" relied upon by cross petitioner was surely nullified long before the commencement of this lawsuit by New York's institution of litigation challenging the validity of New Jersey's taxation of its citizens, which culminated in this Court's decision in *New York* v. *New Jersey*, 429 U.S. 810 (1976).

York's sovereign power to regulate the tax liabilities of its own citizens and to rescind its own legislation. As the New Jersey Supreme Court rightly determined, such relinquishment of sovereign power by one state to another state would encroach on principles of federalism. Under established rule, affirmed in *Multistate,* any agreement threatening the federal structure must comply with the strictures of the Compact Clause. 434 U.S. at 471.*

(b) The concessions in New Jersey's own petition suffice to show that the alleged agreement would be invalid under the Compact Clause.

Cross petitioner concedes:

—The Privileges and Immunities Clause of the Constitution is designed in part to maintain the structural balance essential to the concept of federalism (Cross Petition, p. 10).

—The strictures of the Compact Clause of the Constitution apply to any agreement that *may* encroach upon the supremacy of the United States (Cross Petition, p. 8).

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* New Jersey is hoisted with its own petard. It created an "agreement" out of whole cloth by ascribing solemn characteristics to a press release. It then proceeded to attribute powers to this "agreement" that far surpass even the powers actually granted by the states in the agreement scrutinized in *Multistate.*

Unlike the situation posited by the "agreement" alleged here, no state that was a party to the Multistate Tax Compact relinquished any of its sovereign power. The Commission created by the state had the power to adopt only advisory regulations that would have "no force in any member State until adopted by that State in accordance with its own law." 434 U.S. at 457. Individual states retained *"complete control over all legislation and administrative action"* affecting tax liabilities. *Id.* (Emphasis added.)

—The strictures of the Compact Clause were not complied with since Congress did not consent to the alleged agreement (Cross Petition, p. 8).

These concessions fully dispose of the cross petition's claim, since it obviously follows that (1) a tax challenged as repugnant under the Privileges and Immunities Clause implicates the structural balance essential to the concept of federalism (*Austin* v. *New Hampshire,* 420 U.S. at 662); (2) an agreement to respect or enforce a tax challenged as repugnant to the Privileges and Immunities Clause would implicate "our federal structure" (*United States Steel Corp.* v. *Multistate Tax Commissioner,* 434 U.S. at 478); and (3) any agreement that would "touch on constitutional strictures" or "alter our federal structure" must satisfy the strictures of the Compact Clause (*Id.*).

Thus the purported agreement, even if it existed (which it does not), would be legally unenforceable.

3. The New Jersey Supreme Court's determination that the agreement is irrelevant to the inquiry whether the tax is unconstitutional under the Privileges and Immunities Clause is consistent with recent decisions of this Court and presents no issue worthy of review.

(a) This Court explicitly stated in *Multistate* that any agreement of whatever form between states is itself subject to the limitations of the Privileges and Immunities Clause. 434 U.S. at 478 (citing *Austin*). Cross petitioner fails to recognize this basic point: what one state cannot do alone by means of legislation, two states cannot do together by "agreement." An agreement which, on cross petitioner's terms, would require New York to "respect and enforce" New Jersey's tax statute would be invalid unless the statute the agreement sought to enforce is

constitutional. As the New Jersey Supreme Court rightly determined, the Commuter Income Tax "must independently pass muster under the Privileges and Immunities Clause" (App. A, p. 31a). Thus, cross petitioner's claim adds nothing to the issues already presented by our appeal.

(b) No "agreement" between New York and New Jersey may stop taxpayers from asserting their individual rights under the Privileges and Immunities Clause. As this Court said in *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920):

> "A State may not barter away the right conferred upon its citizens by the Constitution of the United States to enjoy the privileges and immunities of citizens when they go into other States."

252 U.S. at 81. The Court in *Austin* quoted this language, terming it "fully applicable" in that case. Only agreements between states providing "reciprocably *favorable* treatment of nonresidents" are permissible. *Austin* v. *New Hampshire*, 420 U.S. at 667 n.12. An agreement to enforce a statute that would not grant favorable treatment to New York residents would not be an agreement providing "reciprocably *favorable* treatment of nonresidents."* And, as the New Jersey Supreme Court determined, there is no *favorable* treatment of New York residents by New Jersey here (App. A, p. 31a) since New Jersey imposes, at most, a 2½% tax on the income of New Jersey residents while it taxes New Yorkers at a rate of up to 15%.

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* The short answer to New Jersey's circular argument, made in a footnote at p. 11 of its cross petition, that the legislation at issue here is "favorable" or, at worst, "neutral", is found in this Court's decision in *Austin*. The New Jersey legislation is identical with the legislation struck down in *Austin* as not being "reciprocally favorable".

CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,
Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,
Cross Respondents.

On Cross Petition for Writ of Certiorari to the Supreme Court of New Jersey

CROSS PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

	PAGE
CROSS PETITIONER'S REPLY MEMORANDUM	1-5
I	1
II	2
III	2
IV	4

Cases Cited

Austin v. New Hampshire, 420 U.S. 656 (1975)	4
United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978)	4

United States Constitution Cited

Article IV	4, 5

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CROSS PETITIONER'S REPLY MEMORANDUM

I

Initially, it should be noted that the Brief in Opposition to the Petition for Writ of Certiorari does not even discuss the first question presented by the Cross Petition for Writ of Certiorari. Therefore, that part of the cross petition is in effect unopposed.

II

In urging that the court should not grant certiorari to consider the validity of the 1962 Accord between New Jersey and New York and its significance to this controversy, the cross respondents describe the State's reliance upon the agreement as an "afterthought". This characterization seriously distorts the importance attached to the Accord in the proceedings before the trial court. In point of fact, the reciprocal legislative and executive action by the States of New York and New Jersey was set forth at length in the cross petitioner's first brief on the merits filed with the trial court. Furthermore, the existence of that reciprocal arrangement played a central part in Point I of the original brief and it was discussed at length in Point III of the state's reply memorandum. In any event, regardless of the exact manner in which the issue was presented to the state courts, there can be no doubt that it was properly raised. Indeed, it was one of the trial court's alternate grounds of decision and it was also addressed by the Supreme Court of New Jersey although that court found the agreement to be invalid because not entered into in conformity with the Compact Clause. In short, the validity and significance of the 1962 Accord between New York and New Jersey was properly raised in the state courts and the agreement is central to the overall controversy.

III

In arguing that there was no agreement between New York and New Jersey, the cross respondents conveniently ignore the fact that the only court to have ruled on the issue, the state trial court, expressly found that there was an agreement:

> "In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. New York accepted the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude." (Jurisdictional Statement, App B at 56).

Furthermore, there is substantial evidence in the record to support these findings of the state trial court. Although the agreement between the Governors is cavalierly described by cross respondents as a "press release", it is clear that it was understood by the two chief executives to be a solemn reciprocal undertaking. Indeed, it was expressly described by former Governor Rockefeller as ". . . our joint agreement on the administration and enforcement of the personal income tax laws of our respective states . . ." (Appendix to Cross Petitioner's brief filed with Supreme Court of New Jersey, at p. 46). Furthermore, this executive agreement was complemented by changes in the governing legislation and by administrative regulations adopted by the state's taxing authorities. (See the Cross Petition for Writ of Certiorari, at pp. 12-13.) Finally, there can be no serious dispute that these reciprocal undertakings have continued in effect up to the present day.

In short, there is an agreement between the two states, and its validity and significance must be confronted.

IV

In attempting to defend the Supreme Court of New Jersey's conclusion that the 1962 Accord between the two states is invalid because it did not receive the approval of Congress as required by the Compact Clause, the cross respondents engage in the same fallacious reasoning as the Supreme Court of New Jersey. They assume that the agreement must be binding upon New York, thereby precluding New York from terminating it, before it can have any relevance to a state's compliance with the Privileges and Immunities Clause of Article IV. They then read *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) as requiring any agreement between two states which may not be unilaterally terminated by either state as requiring congressional approval pursuant to the Compact Clause. Since the 1962 Accord between New York and New Jersey did not receive congressional approval, the cross respondents conclude that it has no force or effect.

However, the initial assumption of this argument is simply wrong. The policies of interstate cooperation which the Privileges and Immunities Clause was designed to serve permit states to enter into agreements from which either is free to withdraw but which are binding upon the citizens of those states so long as they remain in effect; indeed, the agreement upheld in *United States Steel Corp.* v. *Multistate Tax Commission, supra,* is an example of just such an agreement. The recognition in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975) that states may enter into reciprocal arrangements to coordinate their tax laws in no way suggests that such arrangements must be mutually binding or of indefinite duration to be compatible with the Privileges and Immunities Clause. To the contrary, the policy of reciprocity may be served equally well by a

temporary agreement from which either state is free to withdraw. Therefore, the Supreme Court of New Jersey was simply wrong when it concluded that the 1962 Accord between New York and New Jersey is unenforceable against the taxpayer cross respondents simply because New York may be free to withdraw unilaterally from the agreement. The grant of *certiorari* is therefore required to clarify this misconception of the relationship between the Compact Clause and the Privileges and Immunities Clause of Article IV.

Respectfully submitted,

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